IN THE SUPREME COURT OF MISSOURI

Case No. SC 85276

PURLER-CANNON-SCHULTE, INC. and KARSTEN EQUIPMENT CO.,

Appellants,

v.

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS and CITY OF ST. CHARLES,

Respondents.

Appeal from the Circuit Court of St. Charles County

The Honorable Nancy L. Schneider, Division No. 2

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

Appellants Purler-Canon-Schulte, Inc. and Karsten Equipment Co. appeal the judgments of January 15, 2003 and April 8, 2003, adjudicating all claims, rights, and liabilities of all parties. This Court has jurisdiction pursuant to Mo. Const. Art. V, §3 because this case involves both the validity of a statute of the State of Missouri and the construction of a revenue law of this State. Specifically, the Department of Labor and Industrial Relations' (the "Department") application and enforcement of Chapter 290 RSMo. (the "Prevailing Wage Act" or "Act") and its Occupational Title Rule, 8 CSR 30-3.060 (the "Rule"), is invalid and unconstitutional because the Prevailing Wage Act as so applied and enforced by the Department imposes an unfunded increase in activity and payments by political subdivisions in violation of Article X, §21 of the Missouri Constitution (the "Hancock Amendment"). *See State ex rel. Union Elec. Co. v. Public Serv. Comm'n*, 687 S.W.2d 162 (Mo. banc 1985) (jurisdictional standard). Additionally, because this case involves construction of a Missouri constitutional limitation relating to Article X, "Taxation," the jurisdiction of this Court may be independently invoked as involving construction of a revenue law of the State.

STATEMENT OF FACTS

The case arises from the Department's first application of its Occupational Title Rule under the Prevailing Wage Act to require Pipe Fitter wages to be paid by local governments and their contractors for pressurized pipe projects involving work that has historically been paid the lower General Laborer prevailing wages. The material facts relied on by Appellants are either admitted by the Department or were not genuinely disputed.

The Parties

Appellants Purler-Cannon-Schulte, Inc. and Karsten Equipment Co. are Missouri taxpayers engaged in the business of installing outdoor utility pipes in St. Louis County and St. Charles, Franklin, Jefferson, Lincoln, and Warren Counties in Missouri (the "Subject Counties"). (Legal File ("LF")[1] 99-100, Cannon Aff. at 1-2; LF 104-05, Karsten Aff. at 1-2.) Specifically, Appellants construct and install among other things, outdoor sewer lines, water mains, and other types of pipes or pipelines that are or will be under pressure, including those constituting Public Works Projects as defined in RSMo. §290.210(7) (hereinafter "Outdoor Pipe Projects").

[1] All "LF" references to transcripts and exhibits refer to the Legal File pages contained in the record presented to the trial court or part of Appellant's Motion for Summary Judgment. "S" similarly refers to pages within the Supplemental Legal File and "A" refers to pages within the Appendix.

The Department, through its Division of Labor Standards, is responsible for the application and enforcement of the Prevailing Wage Act. Respondent City of St. Charles is a political subdivision of the State of Missouri subject to the Missouri Prevailing Wage Act that has contracted with Appellants and other contractors for the construction of Public Works Projects. (LF 101, Cannon Aff. at 3; LF 106, Karsten Aff. at 3.)

Prevailing Wage Act History

Since 1957 the Prevailing Wage Act has required political subdivisions and their contractors to pay workers on Public Works Projects "[n]ot less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed." (A-4, RSMo. §290.230.1; *see generally* A-3 - A-9, §290.210 *et seq*.) The Prevailing Wage Act defines "prevailing hourly rate of wages" as "the wages paid generally, in the locality in which the public work is being performed, to workmen engaged in work of a similar character . . . ." (A-3, RSMo. §290.210(5).) At no time since the adoption of the Hancock Amendment on November 4, 1980, has the Missouri Constitution or statute changed the definition, requirement or basis for determining and paying the "prevailing wage." (LF 80, Undisputed Fact ("UF") 6-7; LF 677 (admitted).)

The Prevailing Wage Act does not permit the Department to independently establish or set the wage rate required to be paid for any given work, but rather requires the Department merely to "calculate" or "ascertain" the prevailing wage based only on actual wages paid in the locality for the work performed. (A-5 - A-7, RSMo. §§290.260.1 - 290.262; LF 81, UF 8; LF 677 (admitted); LF 111-13, Baker Dep. at 35-37.)

From 1957 until 1994, the Department issued to political subdivisions "Project Specific Wage Determinations" for inclusion in the bids and contracts for each Public Works Project. (LF 396–97, Baker Dep. at 31-33.) These Wage Determinations identified the prevailing wage rates for each of the job classifications (now called occupational titles) to be employed on the specific project in that applicable "locality" (*i.e.*, county). (LF 396, Baker Dep. at 30-31.) Beginning in 1994, the Department instead began issuing Annual Wage Orders that listed the prevailing wage in each county for every occupational title, and which governed all public works projects for an entire year. (A-12, 8 CSR 30-3.010; LF 236-59.)

Evidence of Actual Prevailing Wage Paid on Outdoor Pipe Projects

Since long before the adoption of the Hancock Amendment, contractors in Missouri have predominantly paid workers on Outdoor Pipe Projects the General Laborer wage rate in the Subject Counties for all non-mechanized work in connection with such Projects. (LF 100, Cannon Aff. at 2; LF 105, Karsten Aff. at 2; *see* LF 203-04, Schultehenrich Aff. at 2-3; LF 205-06, Dobson Aff. at 1-2; LF 207, Luth Dep. at 1; LF 209, Bates Dep. at 1; LF 211, Kelpe Dep. at 1; and LF 213, Unnerstall Dep. at 1; *see also*, LF 81-87.) This has been the case for more than 35 years. (*Id.*; LF 100, Cannon Aff. at 2; LF 105, Karsten Aff. at 2.)

The fact that General Laborer wage rates have been the actual prevailing wage paid over the last forty years in the Subject Counties was not genuinely disputed by the Department. (LF 678-79, UF 10-12 (no rebuttal evidence).) In addition to the unrebutted affidavits establishing this fact, the actual Wage Orders issued by the Department and the

federal government also reflect this historical practice. For example, in the Department's Annual Wage Order No. 1 dated March 9, 1994 ("Annual Wage Order No. 1") and Annual Wage Order No. 2 dated March 10, 1995 ("Annual Wage Order No. 2"), the Department included a job description for the work that was required to be paid at the rate for "General Laborer-Heavy Construction." (A-49 & A-51, respectively; *see* LF 83, UF 16; LF 680 (admitted).) The "Heavy Construction" designation refers to outdoor construction work that the Department acknowledges must be classified separately from indoor construction work, which is designated as "Building Construction." (A-14, 8 CSR 30-3.040 (1), (2) and (3).) The Department's Wage Orders required payment of these "Heavy Construction" rates for all outdoor work, specifically all work that was not "on Buildings and All Immediate Attachments." (LF 238, 265.) The Department listed "Pipe Fitters" work expressly under the indoor and "Building" designation, but included pipeline work expressly under the outdoor "General Labor - Heavy Construction" rates. (*See, e.g.,* LF 237 and LF 255, respectively.) Prior to 1996, with respect to Outdoor ("Heavy Construction") Pipe Projects in St. Charles County, the Department issued Annual Wage Orders requiring the General Laborer wage to be paid for:

> . . . ***all work*** in connection with sewer, water, gas, gasoline, oil, drainage pipe, conduit pipe, tile and duct lines and ***all other pipe lines*** . . .

(A-51 (emphasis added); LF 83-84, UF 16-17; LF 680.)

The Department's language was consistent with the forty-year industry practice of contractors paying the prevailing wage for General Laborers on Outdoor Pipe Projects.

(LF 81-87, UF 9-15.) The Department's language requiring "General Laborer" wages to be paid is also identical to the prior Specific Wage Determinations distributed by the Department and used by the federal prevailing wage agency. (LF 84, UF 18; LF 146-50, Boeckman Dep. at 36-42; A-45 – A-46, 1991 Project-Specific Prevailing Wage Determination.)

Prior to 1995, all Missouri Annual Wage Orders and/or Project Specific Wage Determinations required the "General Laborer – Heavy Construction" wage rate to be paid under this language or its equivalent. (LF84, UF 17; LF 680 (undisputed)). Prior to 1995, nothing published by the Department contained any limitation on the type of work or pipe that it included in this outdoor ("Heavy Construction") work description. (*Id*.)

In 1991, the Missouri Court of Appeals judicially confirmed this wage practice of paying Laborer wages in Jefferson County when it rejected the Department's first documented attempt to impose Pipe Fitter wages on Outdoor Pipe Projects. *Essex Contracting, Inc. v. City of DeSoto*, 815 S.W.2d 135, 139 (Mo.App. 1991) ("*Essex II*") (rejecting imposition of Pipe Fitter wages and affirming payment of Laborer wages on outdoor pressurized pipe project). The Department does not dispute that Laborer wages were in fact required to be paid. (LF 161, 165, Boeckman Dep. at 74, 88). Since the enactment of the Prevailing Wage Act in 1957, no court in the state of Missouri has ever required any wage rate <u>other</u> than the Laborer wage rate to be paid for non-mechanized work on any specific Outdoor Pipe Project. (LF 84, UF 19; LF 681, Dep't Resp. to Pls.' Mot. for Summ. J. at ¶30 ("Department does not dispute"); LF 227, *Essex II,* 815 S.W.2d at 139.)

There is no genuine dispute that in counties throughout Missouri, contractors have predominantly and customarily used *Laborers* and paid the *General Laborer wage rate* on Outdoor Pipe Projects. (*Id.*; LF 219, Labor and Industrial Relations Commission Order of May 30, 1997 (acknowledging the "fact" that Laborers "have traditionally installed pressurized pipe."); s*ee also*, LF 222, Commission Order of June 11, 1997). The undisputed evidence also was that Pipe Fitters did not customarily perform the work and that Pipe Fitter wages were not the wages generally paid in the Subject Counties. (LF 100-01, Cannon Aff. at 2-3; LF 105-06, Karsten Aff. at 2-3; LF 219, 222, Commission Orders; LF 223, 227, *Essex II.*)

Evidence of Department's Change in Prevailing Wage Rate Required

Despite this wealth of evidence that General Laborer wage rates have always been paid for the work on Outdoor Pipe Projects, the Department has now commenced enforcement of the Act to require Pipe Fitter wages as the "prevailing wage." (LF 689, Resp. of Dep't to Pls.' Mot. for Summ. J. at ¶10; LF 694, Suggestions of Dep't. at 4.) Beginning with Annual Wage Order No. 3 in March 1996, the Department ceased including a list of tasks under the job description or occupational title of "General Laborer – Heavy Construction" in its Annual Wage Orders, and started publishing the list of tasks associated with every job classification or occupational title in Missouri in its "Occupational Title Rule" (the "Rule") codified at 8 CSR 30-3.060. (A-14 - A-24; LF 327-54, Department's Annual Wage Order No. 3 dated March 7, 1996 ("Annual Wage Order No. 3"); LF 157-58, Boeckman Dep. at 50-51.) The Rule became effective in 1996. (LF 85, UF 20.)

The Rule's new work description for "General Laborer" was an express change from the descriptions that had been used by the Department over the last forty years in the Project Specific Wage Determinations and Annual Wage Orders. (A-19.) The Department's changes from the prior General Laborer classification (now "occupational title") language are reflected in bold/underline or strikeout as follows:

> "~~**all**~~ work in connection with **non-pressurized pipelines, such as nonpressurized** sewer, water, gas, gasoline, oil, drainage pipe, conduit pipe, tile and duct lines and ~~**all**~~ other **nonpressurized** pipe lines…."

(*Compare* A-19, 8 CSR 30-3.060(K)(2)(A) *with* A-49 & A-51, Annual Wage Orders No. 1 and 2.) The Department also simultaneously adopted a definition of Pipe Fitter for the first time that placed all work on pressurized pipe under that wage rate. (A-22, 8 CSR 30-3.060(T) ("all pressurized piping systems . . .").)

The Department states that it promulgated the new Rule "to overcome the problem identified by the Court in *Essex II,* 815 S.W.2d at 139, that the Department of Labor did not have authority to determine which type of workmen are required to perform a particular task on a public works project." (LF 116-17, 120, 123-24, 130-33; LF 132-33, Exhibit 6 to Baker Dep. at 3-4.)

Prior to enactment of the Rule, nothing published by the Department or included in any Annual Wage Order or Project Specific Wage Determination in Missouri ever recognized this new distinction setting the wage rate based on whether the work was on "pressurized pipe" as opposed to "nonpressurized pipe". (*See* LF 236-59, 260-96, Annual

Wage Orders No. 1 and 2, respectively; LF 297-98, Winslow Aff.) No such distinction exists or has ever existed with respect to wages actually paid for work on Outdoor Pipe Projects in the Subject Counties. (LF 100, Cannon Aff. at 2; LF 105, Karsten Aff. at 2.) The Department claims that as a result of the enactment of this Rule, Pipe Fitter wages are now required for outdoor pressurized pipe, but that it lacked "authority" to require Pipe Fitter wages before the Rule was enacted. **(**LF 157, 171, Boeckman Dep. at 50, 101.**)**

The Department based its new Rule in part on an agency regulation in the State of Washington, a federal government dictionary definition, and other information as to the "tools" and "tasks" at issue, but not evidence as to the actual wages paid or workers used in Missouri. (LF 118, Baker Dep.; LF 216, Commission Order; S 33, Baker letter.) The Department concedes that its new definitions were not based on any actual evidence of wages or practices. (LF 71-72, Admis. No. 8; LF 162-3, Boeckman Dep. at 75-76.)

Specifically, the Department admitted that it has *no evidence* that a majority of worker hours on Outdoor Pipe Projects were paid at the Pipe Fitter prevailing wage rate prior to or at the time it began the application and enforcement of the Rule to require Pipe Fitter wages for such work. (LF 71-72, Admis. No. 8.) The Department also admitted that the marketplace practices had not changed when it commenced enforcing the Rule to require Pipe Fitter wages for such work previously paid at Laborer wages. (LF 162-63, Boeckman Dep. at 75-76.) The Department has also admitted that it has no evidence that workers performing any of the tasks on Outdoor Pipe Projects now required to be paid

Pipe Fitter wages were ever generally paid at the Pipe Fitter prevailing wage, or any wage other than the General Laborer wage. (LF 231-32, Admis. No. 8.)

At an August 1995 seminar presented by the Department in St. Charles County, Colleen Baker, Director of the Missouri Division of Labor Standards, stated that the Department would in fact not interpret the Rule to require Pipe Fitter wages for "all work in connection with" outdoor pressurized pipe (as it is now doing), but rather would only require Pipe Fitter wages for the small amount of time workers spent actually "joining" the pipe. (LF 204, Schultehenrich Aff. at ¶9; LF 384-85, Pikey Aff. at ¶¶3 & 4.) With the new exception of the time "joining" the pipe, this interpretation would have continued the prior practice and wage order language requiring General Laborer wage rate for "all work" on Outdoor Pipe Project.

Although this interpretation would have changed the wage rate at least as to the "joining" of outdoor pipe, the Department nevertheless represented that its new Rule was not intended to change <u>any</u> actual wage rate requirements; rather, its purpose was merely to "clarify and codify *existing* practices" to make it easier for the Department to enforce the Prevailing Wage Act. (LF 86-87, UF 27-28; LF 681 (undisputed).) The Department described the Occupational Title change as "just a procedural change." (LF 396-97, Baker Dep. at 36-37.)

In December 1998, however, the Department received a complaint from the Pipe Fitters' union demanding that Pipe Fitter wages rather than the General Laborer wages be paid on outdoor pressurized pipe projects. In its July 7, 1999 letter, the union expressly complained that the Department, consistent with its 1995 interpretation, had included

only time spent "joining pipe" in settling a complaint on an Outdoor Pipe Project. (A-53; LF 88, UF 33-34; LF 682.) The Pipe Fitter's union representative thereafter stated that he had obtained assurance from the Department that it would "settle cases in a *different manner* in the future." (A-53 (emphasis added).)

After this complaint, the Department for the first time applied its Rule to require the payment of Pipe Fitter wages for all tasks performed on an Outdoor Pipe Project. (LF 88, UF 34; LF 682.) Specifically, in December 1998, the Department cited Appellants for violation of the Prevailing Wage Act, based on the payment of Laborer wages, rather than Pipe Fitter wages, on four specified Outdoor Pipe Projects in St. Louis and St. Charles Counties. **(**LF 102, Cannon Aff. at 4; LF 107, Karsten Aff. at 4.) The citations sought restitution and fines of over $20,000 on the four projects.

Prior to this, the Department had not cited Appellants or any contractor with violation of the Prevailing Wage Act (other than its unlawful efforts in *Essex I*[2] and *II*) for continuing the historical practice of paying the General Laborer wage rate to workers on outdoor pressurized pipe projects. (LF 88, UF 32; LF 100-02, Cannon Aff. at 2-4; LF 105-07, Karsten Aff. at 2-4; LF 190-98, Klinghammer Dep. at 42-45, 52, 68-69, 108-09; LF 180-81, Amos Dep. at 66-67.)

Although the Department claimed its "position" has been consistent, the Department clearly articulated it was changing the wage requirements at least from the pre-Rule definitions imposed by the specific and Annual Wage Orders. As explained by

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[2] *Essex Contracting, Inc. v. City of DeSoto*, 775 S.W.2d 208 (Mo.App. 1989).

the Director of the Division of Labor Standards, "Prior to the rule, work in connection with water and sewer mains was classified as Heavy Laborer . . . . When the rule was created . . . work in connection with the installation of pressurized pipe, in addition to the specific joining of the pipe, was placed under the occupational title of Pipefitter." (S 33, 37, Colleen Baker letters to Rep. Hanaway and Rep. Loudon, respectively.)

Prior to the Department's application of the Rule in this case, the payment of General Laborer wages for all non-mechanized "work in connection with" Outdoor Pipe Projects was not a violation of the Prevailing Wage Act. (LF 151-53, 171 Boeckman Dep. at 44-45, 50; 101 (Department was without "authority" under *Essex* to "enforce" Pipe Fitter wages, admission that paying Laborer wage was "technically probably not" a violation).)

But for the Department's application of the Rule, the General Laborer wage rate would continue to be paid on public projects as the actual wage rate predominantly paid for non-mechanized work in connection with Outdoor Pipe Projects in the Subject Counties. (LF 100, Cannon Aff. at 2; LF 105, Karsten Aff. at 2.) The General Laborer wage rate is still the wage rate actually paid by contractors in the Subject Counties for such work on all private entity Outdoor Pipe Projects that are not subject to the Prevailing Wage Act. (*Id.;* LF 81-87.)

Department's Interpretation of the Rule

The Department now interprets its Pipe Fitter definition to include all work on Outdoor Pipe Projects that is not specifically placed in another Occupational Title. (LF 119, Baker Dep. at 111; LF 382-83, Baker Letter to Bobroff.) To ensure that Pipe Fitter

and not General Laborer wages are now required for Outdoor Pipe Projects, the Department also interprets the revised "General Laborer" definition in its Rule to permit Laborer wages only if the pipeline at issue is "non-pressurized," which the Department considers to be a pipe that is not intended to be pressurized when in use. (LF 69-70, Admis. No. 2.) The Department, however, admits that there is, in fact, no such thing as a gas, gasoline, or oil pipe or pipeline that is not intended to be pressurized when operational because by their very nature (as well as the laws of physics), such pipelines must be under pressure to operate. (LF 108, Karsten Aff. at 5; LF 164, Boeckman Dep. at 87; LF 182-84, Amos Dep. at 89-91; LF 189, Klinghammer Dep. at 40; LF 201, Corcoran Dep. at 87; LF 70, Admis. Nos. 3, 4 & 5.) As a result, the Department concedes that its current interpretation of the Rule relegates to the General Laborer occupational title work that does not in fact exist. (*Id.*)

Increased Costs Resulting from Department's Changed Requirement

The Department did not genuinely dispute that the imposition of Pipe Fitter wage rates has substantially increased the labor cost to public entities for Outdoor Pipe Projects in the Subject Counties. The Department's application of its Occupational Title Rule now requires political subdivisions and their contractors to pay the Pipe Fitter wage rate for work that previously was lawfully paid at the General Laborer wage rate. (LF 90, UF 38; LF 151-53, 159-60, Boeckman Dep. at 43-45, 72-73; LF 223, *Essex II*.) The prevailing wage rate for the occupational title of Pipe Fitter is, and at all times since prior to the adoption of the Hancock Amendment has been, higher than the prevailing wage rate for the occupational title of General Laborer during the same time periods. (LF 101-02,

Cannon Aff. at 3-4; LF 106-07, Karsten Aff. at 3-4; LF 40, UF 39.) The Department admitted that, all else being equal, an increase in a wage rate increases the cost of the public works project. (LF 73, Admis. No. 13.)

Since 1994, the average hourly wage rate in the Subject Counties (including required benefits) for Pipe Fitters has been $10.54 higher than the average hourly wage rate (including benefits) for General Laborers, which would represent a 42.4% increase in the applicable wage rate on Outdoor Pipe Projects. (LF 90, UF 40; LF 684 (undisputed).)

The Department's application of its Rule to require Pipe Fitter prevailing wages be paid to workers on Outdoor Pipe Projects has increased and will continue to increase the cost to public contractors and political subdivisions for public works projects involving outdoor pressurized pipe. (LF 102-03, Cannon Aff. at 4-5; LF 107-08, Karsten Aff. at 4-5; LF 380-81, Markenson Aff.) The increase in cost to political subdivisions resulting from the Department's action is substantial. (*See*, e.g., LF 103, Cannon Aff. at ¶17.) On just one Outdoor Pipe Project completed in one of the Subject Counties, the Department's requirement of Pipe Fitter wages caused a direct increase in the cost to the political subdivision of more than $18,000. (LF 107.) The undisputed evidence reflected that political subdivisions are directly forced to pay the cost of an increased wage rates. (*Id.*) The General Assembly did not appropriate funds to cover these increased costs to local governments. (LF 204, Schultehenrich Aff. at ¶10; LF 23, Petition at ¶62; LF 37, Dept's Amended Answer at ¶ 62.)

Procedural History

On April 18, 2000, Karsten and Purler-Cannon filed a petition in St. Charles Circuit Court seeking Declaratory Judgment and other Relief that the Department's enforcement actions (requiring Pipe Fitter wages, penalties and restitution) violated the Hancock Amendment of the Missouri Constitution, the requirements of the Prevailing Wage Act, and the language of the Department's own Rule. The Department filed Counterclaims seeking enforcement of the restitution and penalties on the four previously cited Outdoor Pipe Projects. (LF 30-50.) On January 15, 2003, the trial court entered judgment for the Department and against Appellants on all counts, but without addressing the counterclaims of the Department. (A-26 – A-39.) After the parties stipulated dismissal of the Counterclaims for purpose of appeal (LF 817-24), the Circuit Court rendered judgment on April 8, 2003, adopting the January 15 Judgment as the judgment of all claims and all parties. (A-40.) Appellants timely appealed both judgments to this Court. (LF 825-51.)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEPARTMENT IN THAT THE DEPARTMENT'S ENFORCEMENT OF THE PREVAILING WAGE ACT VIOLATES ART. X, § 21 OF THE MISSOURI CONSITUTION BECAUSE IT IMPOSES AN INCREASED ACTIVITY AND COST ON POLITICAL SUBDIVISIONS IN REQUIRING PAYMENT OF A PIPE FITTER WAGE RATE WHICH IS A HIGHER RATE CLASSIFICATION THAN HAS PREVIOUSLY BEEN PAID OR LAWFULLY REQUIRED ON OUTDOOR PIPE PROJECTS

Mo. Const. Art. X, §§ 21, 23

Boone County Court v. State, 631 S.W.2d 321 (Mo. banc 1982)

Missouri Municipal League v. State, 932 S.W.2d 400 (Mo. banc 1996)

Essex Contracting, Inc. v. City of Desoto, 815 S.W.2d 135 (Mo.App. 1991)

Missouri Municipal League v. Brunner, 740 S.W.2d 957 (Mo. banc 1987)

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEPARTMENT BECAUSE THE DEPARTMENT'S FIRST APPLICATION OF THE OCCUPATIONAL TITLE RULE TO OUTDOOR PIPE PROJECTS VIOLATES THE PREVAILING WAGE ACT IN THAT IT IMPOSES A WAGE RATE FOR SUCH WORK WITHOUT REGARD AND CONTRARY TO THE

ACTUAL WAGE RATES PAID OR WORKERS USED IN THE LOCALITIES FOR THAT WORK

RSMo. §*290.250, et seq.*

City of Joplin v. Indus. Comm'n of Missouri, 329 S.W.2d 687 (Mo. 1959)

Central Missouri Plumb. v. Plumb. Loc. 35, 908 S.W.2d 366 (Mo.App. 1995)

Branson R-IV Sch. Dist. v. Labor and Indus. Rel. Comm'n, 888 S.W.2d 717 (Mo.App. 1994)

Essex Contracting, Inc. v. City of DeSoto, 815 S.W.2d 135, 138 (Mo.App. 1991)

III. THE TRIAL COURT ERRED IN UPHOLDING THE DEPARTMENT'S INTERPRETATION OF THE OCCUPATIONAL TITLE OF "GENERAL LABORER" AS AUTHORIZING SUCH WAGES ONLY FOR WORK ON PIPELINES THAT ARE NOT "PRESSURIZED" WHEN IN OPERATION IN THAT IT RENDERS 8 CSR 30-3.060(K)(2)(A) VOID AS APPLIED BECAUSE THAT INTERPRETATION MAKES KEY PORTIONS OF THE LANGUAGE MEANINGLESS.

8 CSR 30-3.060(K)(2)(A)

Hyde Park Housing P'ship v. Dir. of Rev., 850 S.W.2d 82 (Mo. banc 1993)

ARGUMENT

Summary

Appellants were entitled to judgment as a matter of law on three separate grounds. First, the Department's application of the Rule violates Article X, Section 21 of the Missouri Constitution (the "Hancock Amendment") because it directly increases the costs of complying with the Prevailing Wage Act without a corresponding state appropriation. Second, the Department's application of the Rule exceeds its statutory authority because it imposes a higher wage rate for workers on Outdoor Pipe Projects in disregard of the actual wage rate "generally paid" for such work in the Subject Counties and throughout the state. Finally, the Department's interpretation of the Rule's "Pipe Fitter" and "General Laborer" Occupational Title subsections requires key language to be completely read out of the Rule, rendering such language meaningless and making the Rule void as applied.

This case challenges the Department's first actual and threatened application of its Occupational Title Rule requiring Pipe Fitter wages on Outdoor Pipe Projects. The undisputed evidence was that the General Laborer wage, not the Pipe Fitter wage, is and always has been the wage that is generally paid in the Subject Counties for work on Outdoor Pipe Projects. The Department's actions seek to alter the actual marketplace wage by unilaterally declaring that the higher Pipe Fitter wages must now be paid on Outdoor Pipe Projects. As such, the Department's application of its Rule violates the Hancock Amendment, the Prevailing Wage Act, RSMo. §290.010 *et seq.*, and even the language of the Rule itself.

This case is ***not*** a challenge to the authority to enact the Occupational Title Rule itself or its process, nor is it a challenge to any decision by the Department refusing to alter or modify any part of that *procedural* Rule. Rather, this is a substantive challenge to the Department's first actual *application* of the Rule ever requiring payment of the Pipe Fitter rates to essentially all work on Outdoor Pipe Projects.

For nearly forty years, the actual wage rate paid in the Subject Counties and throughout the state for Outdoor Pipe Projects has been the General Laborer wage. Moreover, Laborers – not Pipe Fitters – have been the worker that performed this work. During this time, the Department issued Wage Orders and enforced the Prevailing Wage Act that required Laborer, not Pipe Fitter, wages to be paid on such Projects (albeit reluctantly by court order), thereby allowing political subdivisions and contractors alike to work within this framework to complete countless public works projects throughout the state.

This case exists today because in late 1998 the Department commenced a new enforcement of the Act and its Rule, forcing Pipe Fitter Wages for outdoor pipes that are "pressurized." This new distinction is a creation of the Department based on its academic review of "similar tools" or "similar skills" in disregard to the actual worker used, actual wage paid, and even a prior court order requiring Laborer wages to be paid on an outdoor pressure pipe project. In short, the Department now requires political subdivisions and their contractors to pay higher "Pipe Fitter" wages for work that has always lawfully been paid at lower "General Laborer" wages despite the <u>undisputed</u> fact that the marketplace

for such wages has not changed and that Pipe Fitter wages are in fact the wage actually paid in the locality.

The Department's actual and theoretical enforcement violates the Hancock Amendment by forcing political subdivisions and their contractors to pay a significantly higher wage for exactly the same work that private contractors in the local marketplace continue to pay at the lower Laborer wage. The wage classification required by the Act in 1981 and at all times prior to the Department's current enforcement, was the wage "actually paid" in the locality – the General Laborer Wage. The Department concedes it had no "authority" to require Pipe Fitter wages prior enactment of it new Rule. As such, even if the new Rule could create such "authority," it changed the wage classification in place as of 1981 and therefore may not be enforced without corresponding funding to the local governments bearing the cost.

In addition, the Department exceeded its statutory authority by imposing a wage rate contrary to the "actual wages" paid in the marketplace. While it may have authority to classify workers and work in any reasonable fashion, it may not use such procedural definitions to substantively change the wage actually paid. The Department concedes it was not concerned with actual wages paid or type of workers used, but based its decision on "similar tools" or "similar skills" to impose its own opinion as to what rate should be paid. This violates the language and fundamental purpose of the Act, which allows only imposition of the wage that actually "prevails" in the locality.

Finally, the Department's unlawful application is accomplished only by an interpretation of its Rule that even the Department admits it would make some of the

words meaningless. To effect the change from past practices and the prior definition of "General Laborer" in its pre-1996 Wage Orders to its current application, the Department concedes that it must limit its new General Laborer occupational title to apply to work – including work on "non-pressurized gas lines" – that does not, and cannot exist, under the current laws of physics. Unless the Department also believes it has the authority to unilaterally change those laws, the interpretation of its Rule is meaningless and constitutes a third basis for invalidating the Department's unlawful imposition of Pipe Fitter Wages to Outdoor Pipe Projects.

Background

In 1957, the General Assembly declared the policy underlying the Prevailing Wage Act as follows:

> It is hereby declared to be the policy of the state of Missouri that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed shall be paid to all workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work.

(A-4, RSMo. §290.220.) The Missouri General Assembly enacted the Prevailing Wage Act to protect localities from having their local workforce undermined by contractors transporting cheaper labor for public works projects. In *Henry County Water Co. v.*

McLucas, 21 S.W.3d 179 (Mo.App. 2000)[3] the court explained that the Missouri Prevailing Wage Act was modeled after the federal Davis-Bacon Act, 40 U.S.C. § 276(a) *et seq*., which was "aimed at preventing rival companies from competing for contracts by transporting from distant areas workers who would work for substandard wages." *Id.* at 181 (citing *Vulcan Arbor Hill Corp. v. Reich*, 81 F.3d 1110, 1111 (D.C. Cir. 1996)).

In order to comply with the Act, political subdivisions and their contractors are mandated to pay workers on public works projects "[n]ot less than the prevailing hourly rate of wages for work of a similar character" in the county the public works project is located. (*See* A-4, RSMo. § 290.230.) "Prevailing hourly rate of wages" is defined in the Act as "the wages paid generally, in the locality in which the public works is being performed, to workmen engaged in work of a similar character . . . ." (A-3, RSMo. § 290.210(5); *see also* LF 80-81, UF 4-7).)

This Court has confirmed that the phrase "prevailing rate of wages" is "synonymous with market rate." *City of Joplin v. Industrial Comm'n of Mo.* 329 S.W.2d 687 (Mo. 1959) (quoting Justice Cardozo). Accordingly, "a prevailing wage must, if possible, be based on a wage actually paid within a locality." *Branson R-IV Sch. Dist. v. Labor & Indus. Rel. Comm'n*, 888 S.W.2d 717, 723-24 (Mo.App. 1994) (emphasis added); C*entral Missouri Plumbing v. Plumbers Local 35*, 908 S.W.2d 366, 371 (Mo.App**.** 1995) (same). Thus, the Department has no discretion to establish a wage rate

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[3] *Abrogated on other grounds* by *Division of Labor Standards v. Friends of the Zoo of Springfield, Mo., Inc.*, 38 S.W.3d 421, 423 (Mo. banc 2001).

of its own choosing, but rather it must use the actual wage rate paid for the work in the locality regardless of what label or classification the Department decides to place on that work. (LF 81, UF 8; LF 113, Baker Dep. at 37; LF 677 (undisputed).) In other words, the Act does not permit the Department to set a wage it thinks is fair, but rather it requires the Department merely to "ascertain" the wages that actually "are paid" in the locality for such work. *Id.*

Standard of Review

When considering appeals from summary judgment, a court will review the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). The non-movant is accorded the benefit of all reasonable inferences from the record. *Id*. at 376. This Court's review is essentially *de novo* and an appellate court need not defer to the trial court's order granting summary judgment. *Id*.

When a response to a summary judgment motion does not contain any citations to rebut the factual assertions in the motion, a court must take the factual assertions contained in the motion as true. *Armoneit v. Ezell*, 59 S.W.3d 628, 634 (Mo.App. 2001) (non-movant's mere assertion that movant had not made *prima facie* case was insufficient response to factual assertions and did not preclude granting of summary judgment). When reviewing summary judgment, the court must evaluate the sufficiency of the evidence to support the judgment and may enter "such judgment as the trial court ought to have given." Mo.R.Civ.P. 84.14; *Kramer v. Fallert*, 628 S.W.2d 671, 674 (Mo.App. 1981).

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEPARTMENT IN THAT THE DEPARTMENT'S ENFORCEMENT OF THE PREVAILING WAGE ACT VIOLATES ART. X, § 21 OF THE MISSOURI CONSITUTION BECAUSE IT IMPOSES AN INCREASED ACTIVITY AND COST ON POLITICAL SUBDIVISIONS IN REQUIRING PAYMENT OF A PIPE FITTER WAGE RATE WHICH IS A HIGHER RATE CLASSIFICATION THAN HAS PREVIOUSLY BEEN PAID OR LAWFULLY REQUIRED ON OUTDOOR PIPE PROJECTS

The trial court's judgment contradicts both this Court's application of the Hancock Amendment to "discretionary" governmental activities as well as the uncontroverted evidence that the Department has unilaterally changed and increased wage rates from the wage actually and legally paid in the Subject Counties since prior to 1981.

A. Elements of a Hancock claim

The Hancock Amendment — Article X, Sections 16 through 24 of the Missouri Constitution — was adopted on November 4, 1980. Section 21 provides in relevant part:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made to pay the county or other political subdivision for any increased costs.

(A-10, Mo. Const. Art. X, §21.) "[S]ection 21 prohibits the state from requiring local government to begin a new mandated activity or increase the level of a previously mandated activity beyond its 1980-81 level unless the General Assembly appropriates sufficient funds to finance the cost of the new or increased activity." *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995). An agency rule, such as the Department's Occupational Title Rule, violates this section of the Hancock Amendment if: (1) it requires a new or increased level of activity or service of a political subdivision; and (2) the political subdivision experiences increased costs in performing that activity or service. *St. Charles County v. Director of Revenue*, 961 S.W.2d 44, 48 (Mo. banc 1998).

In *Boone County Court v. State*, 631 S.W.2d 321, 325 (Mo. banc 1982), this Court recognized that a state law requiring a political subdivision to pay a higher wage for the same work was a state-imposed "increase in the level of any activity," and thereby constituted a Hancock violation. This Court closely analyzed the language and the purpose of the Hancock Amendment, and concluded that:

> 'Any activity' as applied to county functioning encompasses every increase in the level of operation in that government. To the extent that the county court is mandated to pay the collector more, an increase in the level of governmental operation results and therefore the salary increase is 'an increase in the level of any activity.'

Id. at 325 (quoting Mo. Const. Art. X, § 21).

B. The Undisputed Evidence.

The facts establishing these Hancock elements were either admitted or not disputed by any rebutting evidence.

1. The General Laborer Wage Has Been Legally Actually Paid For Over 40 Years For Outdoor Pressurized Pipe Projects in the Subject Counties.

A Hancock Amendment claim requires an "increase" in a requirement on a political subdivision. Therefore, the Court must first look to what has been the Prevailing Wage requirement prior to the Department's challenged action. On this point, there is simply no *genuine* dispute. Workers in the Subject Counties have been paid Laborer prevailing wages – not Pipe Fitter prevailing wages – since the inception of the Prevailing Wage Act, and certainly since prior to 1981. (LF 81, UF 9-11; LF 677-78.)

The Department did not offer a single affidavit or other factual rebuttal to this material fact. The Department's mere recitation that Appellants failed to "adequately" support its Undisputed Facts is clearly insufficient rebuttal. *Armoneit*, 59 S.W.3d at 634 (mere assertion that movant had not made *prima facie* case was insufficient response). Under this governing standard, the failure to provide countering evidence requires acceptance of the fact alleged.

Moreover, Appellants' affirmative evidence on this point was not only unrebutted, it was overwhelming, including admission and evidence that:

a) The Department had "no authority" prior to 1996 to require Pipe Fitter wages on Outdoor Pipe Projects "from an enforcement standpoint based on *Essex*." (LF 92-93, UF 50, 54; LF 157, 171; Boeckman Dep. at 50, 101.)

b) The Department "has no evidence" that Pipe Fitter wages were paid for the majority of hours prior to enforcement of its Rule. (LF 71-72, Admis. No. 8; LF 82-83, UF 14.)

c) Plaintiffs provided eight unrebutted qualified affidavits, each independently confirming that Laborer wages have been the actual wages paid on Outdoor Pipe Projects in the Subject Counties since long prior to 1980. (LF 99-108, 202-14.) These affidavits include those of Jack Cannon and Ken Karsten, having, respectively, 35 and 40+ years of experience in the industry, who testified that Laborers' wages were always paid prior to the Department's recent enforcement and that it has been Laborers – not Pipe Fitters – who have customarily performed the work. (LF 100-01, 105-06.) These fundamental facts were also confirmed by the Executive Director of SITE Improvement Association, the 35-year old organization of contractors, whose member contractors have performed over "eighty-five percent (85%)" of all pressurized and unpressurized pipe projects for local governments. (LF 203.) The affidavits of five other contractors with experience dating back as many as 50 years in the Subject Counties all also confirmed that Laborers have customarily performed this work paid at Laborers' prevailing wage. (LF 205-14.)

d) The Department did not offer a single countering affidavit to dispute the Undisputed Fact that Laborer Wages have always been paid and merely claimed that the facts were not "adequately supported." (LF 677-78.)

e) Unrebutted affidavits that Laborers' wages are still the wage paid in the marketplace on pressurized pipe projects that are not subject to the Department's Prevailing Wage enforcement. (LF 100, 105, 204, 206-07, 209, 211 & 213.)

f) The Department admitted that Laborers "have traditionally installed pressurized pipe." (LF 82, UF 12; LF 679 (no rebuttal evidence); LF 219, Commission Order.)

g) The Department's Annual Wage Orders prior to the Rule required the General Laborer Wage to be paid for "***all work*** in connection with sewer, water, gas, gasoline, oil, drainage pipe, conduit pipe, tile and duct lines and ***all other pipe lines"*** (emphasis added). (LF 255, 286; LF 83-84, UF 16-17; LF 680 (undisputed).) The Department's Supervisor admitted that this language would be understood to include work on "pressured pipes." (LF 182, Amos Dep. at 89.)

h) The Department admitted that it distributed federal prevailing wage orders that contained virtually identical language, also requiring Laborer wage rates for "all work" in connection with Outdoor Pipe Projects. (LF 84, UF 18; LF 681 (no rebuttal evidence).)

i) The Department admitted that the language describing the General Laborer classification was changed to eliminate the word "all" and to include the limiting words "non-pressurized" to change the definition from that in all prior Annual Wage Orders. (LF 83-84 & 87, UF 16-17 & 29; LF 680-81 (undisputed).)

j) The Department was unable to cite a single decision in forty years in which it successfully required Pipe Fitter wages to be paid in an Outdoor Pipe Project or

any other evidence rebutting the proof that Laborer wages, not Pipe Fitter wages, have always been lawfully paid. (*See* LF 82-83, UF 13-14; LF 679-80.)

Finally, the Court of Appeals for the Eastern District of Missouri, governing the Subject Counties, expressly held in 1991 that Laborer wages, not Pipe Fitter wages, were the required wage in an outdoor pressured pipe project in 1985-86 because "laborers in Jefferson County working on public works projects customarily installed ductile iron pipe." *Essex II*, 815 S.W.2d at 138. The Department does not dispute that ductile iron pipe is pressurized pipe nor that its efforts to impose Pipe Fitter wages were held to be unlawful in *Essex II*. (LF 92-93, UF 50-53; LF 685 (undisputed).)

The Department's legal position depends entirely on its claim that it can determine what wage classification (and therefore what rate) should be paid without regard to the actual wages paid and workers used for that same work in the marketplace. (LF 422-23, Baker Dep. at 136-38.) Its enforcement of Pipe Fitter wages is premised on its belief that it can decide the required wage based on dictionary definitions and similarity of "tools" or "skills" without regard to the actual worker used and wage paid for the same or identical work. Yet, in light of the unrebutted evidence of the past wage classification used and rates paid, the Department's imposition of Pipe Fitter wages now is unequivocally a change in wage requirements borne by local governments. As such, it violates the Constitution, irrespective of even the most well-intentioned of bureaucratic justifications. As noted by this Court, "[t]he road to compliance with Article X, Section 21, cannot be paved with good intentions." *City of Jefferson v. Missouri Dep't of Natural Res.*, 863 S.W.2d 844, 849 (Mo. banc 1993).

2. The Department Now Seeks To Impose Payment of Pipe Fitter Wages.

The Department is now requiring Pipe Fitter wages for the same work that was previously paid at General Laborer wages. The Department claims the right to require Pipe Fitter wages even in Jefferson County where it has already been judicially prohibited from requiring Pipe Fitter wages on an Outdoor Pipe Project. (LF157, 171; Boeckman Dep. at 50, 101.)

The trial court accepted the Department's claim that it had always taken the same "position" and therefore the Department had not changed its own interpretation. (See A-32, Judgment.) Yet, given that the *Essex* decisions overturned the Department's attempt to impose Pipe Fitters wages, the Department's claim of consistency is really that its position has been "consistently" illegal! The question, of course, is not whether the Department's position as to what it thinks the law *should* be has changed, but whether the Department's requirement is a change from the wage that was *legally* paid in the past.

About this there is simply no genuine dispute. Even if the Department could ignore the language of its own Wage Orders and claim it has always tried to enforce Pipe Fitter wages, the Department admitted, as it must, that it previously had no "authority" to enforce Pipe Fitter wages. (LF 92, UF 50; LF 93, UF 54; Boeckman Dep. at 50, 101; LF 685-86 (undisputed).) The Department now, however, claims newly created "authority" in its Rule to enforce what it concedes it legally could not and did not previously require. (LF 152-53, Boeckman Dep. at 44-45; LF 89-91, UF 37-42; *see* Counterclaim.) Indeed, the Department expressly admitted that this Pipe Fitter requirement was first "enforced" in late 1998 (LF 88, UF 32) only after receiving a complaint from a representative of the

Pipe Fitter's union who claimed he had been assured by the Department that it would "settle cases in a different manner in the future." (LF 88, UF 34; A-53 (emphasis added).) Given the unrebutted history of paying Laborer wages, the language of the Department's own Wage Orders, the judicial ruling in *Essex*, and the Department's own admission that it previously lacked "authority" to impose the higher wage rate, there can be no doubt that the imposition of such wages now is clearly a "changed" requirement.

Finally, any pretense by the Department that it has not "changed" the required wage rate from Laborer to Pipe Fitter is utterly belied by the Division Director's explanation to two State Legislators of the Department's conduct:

> Prior to the rule, work in connection with water and sewer mains was classified as *Heavy Laborer*, and was listed in an explanation section of the language of the wage order. When the rule was created . . . work in connection with the installation of pressurized pipe, *in addition to the specific joining of the pipe*, was placed under the occupational title of Pipefitter. (emphasis in original.)

(S 33 & 37, Colleen Baker's letters to Rep. Hanaway and Rep. Loudon, respectively.)

The Department must face the facts; it has indisputably imposed a requirement that "changes" the required wage rate for Outdoor Pipe Projects from "Laborer" to "Pipe Fitter."

3. The Pipe Fitter Wage Is and At All Times Has Been Materially Higher Than the Laborer Wage in the Subject Counties.

The Department does not dispute that the Pipe Fitter hourly wage rate in the Subject Counties is an average of $10.54 higher than the General Laborer hourly wage rate – an

increase of more than 42% over the Laborer rate. (LF 90, UF 40; LF 684.) Nor does the Department dispute the evidence that the prevailing wage for Pipe Fitters has at all times been higher than the prevailing wage for Laborers in the Subject Counties. **(**LF 71, Admis. No. 7.) The contractors' testimony as to customs and practice over the last forty years was also unrebutted. (LF 101-02, Cannon Aff. at 3-4; LF 106-07, Karsten Aff. at 3-4.)

The Department offered no countering evidence but argued that it is theoretically possible that the rate could someday be lower. While the theoretical possibility that someday, somewhere the Department's actions *might* not cause an unlawful mandated increase in costs is not a defense to times and places at issue here where it *is* a mandated increased cost. There is simply no evidence to rebut the undeniable fact that the Pipe Fitter rate is and has always been substantially higher than the General Laborer rate in the Subject Counties.

4. The New Wage Rate Has Already Caused an Increased Cost To Political Subdivisions.

A violation of the Hancock provision does not require that increased costs be dramatic. In fact, any increase greater than *de minimis* is sufficient. *City of Jefferson v. Missouri Dep't of Natural Res.*, 916 S.W.2d 794, 795 (Mo. banc 1996) ("*Jefferson II*") (finding $15,289 increased cost violated Hancock Amendment).

Increasing the wage rate classification that local governments must pay to workers "employed by or on behalf of any public body engaged in public works" (A-4, RSMo. § 290.220) undeniably increases the costs to public bodies in the Subject Counties. The

Department does not genuinely dispute this fact, but instead claims only that the increase in the applicable Prevailing Wage rate "does not directly increase any cost of operation of political subdivisions." (LF 699, Dept.'s Sugg. at 9 (emphasis added).) This Court, however, has been quite clear that the prevailing wage law is a requirement that *is* imposed directly on "public bodies" and that "[a] public body constructing public works may not circumvent the prevailing wage law by a 'carefully constructed legal façade.'" *Division of Labor Standards v. Friends of the Zoo*, 38 S.W.3d 421, 423 (Mo. banc 2001) (citing *State ex inf. Webster ex rel. Division of Labor Standards v. City of Camdenton*, 779 S.W.2d 312, 316 (Mo.App. 1989) (rejecting attempt to claim that workmen were not performing work "on behalf" of the public body)). The Department's similar "legal facade" here – that increased costs to public bodies would not be "directly" imposed – must also be rejected as both legally and factually wrong. The Department has increased the costs borne by political subdivisions both directly and indirectly.

The unrebutted evidence of this included: (1) the Department's admission that an increase in the prevailing rate classification increases "the cost of public works projects," assuming other factors remained the same (LF 89, UF 36; LF 73, Admis. No. 13), and (2) unrebutted affidavits by contractors and the Missouri Municipal League testifying as to specific increased costs to political subdivisions that have been and will be a "direct result" (LF 102-03, Cannon Aff. at 4-5; LF 107-08, Karsten Aff. at 4-5; LF 381, Markenson Aff. at 2) (*e.g.*, $20,000 on recent projects from just one contractor).) One can hardly argue that a City constructing a new water line under a "time and materials" contract will not "directly" pay 42% more in labor costs on the "time" portion of that

contract. Regardless of the type of contract, however, the undisputed evidence is that the political subdivisions actually bear the ultimate cost of the increased wage classification.

In short, political subdivisions and their taxpayers have unequivocally already been forced to pay more than *de minimis* increased cost due to the Department's actions.

5. No State Funds Have Been Appropriated To Cover These Increased Costs.

There is no genuine dispute that no appropriation has ever been made to pay for the increased costs. (LF 91, UF 45; LF 685; LF 422, Baker Dep. at 136; *see* Mo.R.Civ.P. 55.09.)

6. Imposition of an Increased Prevailing Wage Classification is a "Requirement" on Political Subdivisions under Hancock.

The Prevailing Wage Act is a direct mandate on political subdivisions expressly requiring that "all workmen employed by or on behalf of any ***public body*** engaged in public works" be paid the prevailing wage. (A-4, RSMo. §290.220 (emphasis added).)[4] The Department does not dispute that Prevailing Wage Act requirements are legal requirements imposed on political subdivisions. (LF 80, UF 4, 5; LF 677 (undisputed).) Indeed, the failure of political subdivisions to comply with the Prevailing Wage Act

[4] RSMo. §290.250 further requires that the "***public body*** awarding the contract ***shall*** cause to be inserted in the contract a stipulation to the effect that not less than the prevailing hourly rate of wages shall be paid to all workmen performing work under the contract . . . . It ***shall*** be the duty of such ***public body*** awarding the contract . . . ." (A-4 – A-5) (emphasis added).

subjects such "officer, official, member, agent or representative of any public body" to criminal penalties. (A-9, RSMo. §290.340.)

In this case, the Department's application of its Rule to Outdoor Pipe Projects operates on political subdivisions such as defendant City of St. Charles in the same way as did the mandate to increase the collectors' pay in *Boone County*. Political subdivisions are now subjected to a state-imposed higher Pipe Fitter wage rate for the same public works activities that were previously paid at the lower General Laborer rate and therefore the enforcement similarly imposes "an increase in the level of any activity." *Boone County*, 631 S.W.2d at 325; A-10, Mo. Const. Art. X, § 21.

The trial court rejected application of Hancock to the Department's actions, holding that the Department's actions did not cause any new or increased activity required of cities. (A-33, Judgment.) Specifically, the trial court held that no new costs were being mandated in part "[b]ecause a political subdivision could avoid the increased costs by choosing not to go through with a contemplated construction project." (A-33, Judgment (citing *City of Jefferson*, 863 S.W.2d at 847-48).) This interpretation of the Missouri Constitution nullifies the Constitutional protection, as local governments can no more practically "choose" not to perform its functions than they can "choose" not to provide police protection or other basic municipal services. This Court has already directly rejected the trial court's interpretation.

In *Missouri Municipal League v. State,* 932 S.W.2d 400, 402-03 (Mo. banc 1996) *("MML"),* the State imposed an increase in the water testing fee required of cities that provided public water service. *MML*, 932 S.W.2d at 401. Similar to the State's argument

here, the State contended that "because providing water is a discretionary activity, water testing is not 'required' of a political subdivision." *Id*. at 402. This Court expressly rejected the point because:

> The distinction allows the government to thwart the purpose of the Hancock Amendment. Once the state imposes a requirement on a political subdivision, it makes no difference whether the underlying service is one traditionally performed by the government.

Id. at 403. In so ruling, this Court overruled prior case law that distinguished between required government functions and discretionary "proprietary" functions. *Id.* at 402-03 (overruling *State ex rel. City of Springfield v. Missouri Pub. Serv. Comm'n*, 812 S.W.2d 827 (Mo.App. 1991) (holding that new gas safety rules were not a mandate because providing gas was a discretionary city function)). The *MML* Court therefore held that an increased water testing fee violated the Hancock Amendment because the water testing fee was "required," even though there is no dispute that the State does not "require" cities to provide public water service itself. *MML*, 932 S.W.2d at 402-03.

Thus, as this Court noted, it simply makes no difference whether the "underlying" activity is "discretionary" or not. The relevant question is, whether once the underlying activity is assumed by the local government – whether it be providing water service or building water systems – is the activity subject to a new requirement or increased cost? As in *MML*, there is simply no doubt that the political subdivisions here are "required" to follow the Prevailing Wage Act requirements when they enter into contracts for Outdoor Pipe Projects and other "public works" construction.

In *MML*, this Court also expressly rejected application of *City of Jefferson*, 863 S.W.2d 844, relied on by the Department and trial court here. *MML*, 932 S.W.2d at 403. In *MML*, the required water testing fee mandated increased costs on providing public water service, an underlying activity that was itself obviously not "required" of cities and – in the trial court's words – one that could be avoided by a city "choosing" not to provide water service at all. (A-33, Judgment.) While *City of Jefferson* held that no mandate existed *under one part of a statute* allowing for optional waste management districts, the *MML* Court noted that *City of Jefferson* was simply not on point because the statute contained 'ho express statutory language requiring a municipality to join a solid waste management district" and so it was "unnecessary for this Court to reach the issue presented here" (where the water testing fee clearly was required by statute). *MML*, 932 S.W.2d at 403. *MML* clearly settles the issue that the discretionary character of the underlying activity is of no consequence if, once undertaken, the statute imposes a mandatory requirement that increases the cost to the political subdivision. *See State v. City of Glasgow*, 966 F.Supp. 905 (W.D.Mo. 1997) (in light of *MML* and its overruling of *City of Springfield*, the district court vacated its prior holding that the Hancock Amendment was not violated by water plant testing fees "because defendant was not required by Missouri law to operate a water treatment plant"), *rev'd on other grounds*, 152 F.3d 802 (8th Cir. 1998); *see also Missouri Municipal League v. Brunner*, 740 S.W.2d 957 (Mo. banc 1987) *("Brunner")* (holding regulations imposing costs on operations of landfills (an optional underlying activity) stated a Hancock claim).

In short, in *MML* (as well as in *Brunner* and *Glasgow)*, a Hancock claim existed even though the "underlying service" subject to the increased cost – water service, landfill operation, and water treatment plants – were all "discretionary" or optional in that such underlying activities were not themselves mandated by law. No statute "required" any of these underlying activities. In each case, a Hancock claim was stated because, even though discretion existed not to undertake such activities, that discretion was irrelevant because having undertaken the activity, the State was now subjecting it to a new cost-increasing "requirement." Here, cities are also not required by law to contract for Outdoor Pipe Projects or other public works projects, but similarly they ***are*** required to comply with the Prevailing Wage Law when they do so. The Prevailing Wage Law is not discretionary; it is mandatory on public bodies. Accordingly, the trial court erred in holding that increased requirements on local governments through increased wage classifications did not impose an unlawful mandate. *See MML*, 932 S.W.2d at 404.

The trial court also erred in relying on *Associated General Contractors v. Department of Labor & Industrial Relations*, 898 S.W.2d 587 (Mo.App. 1995) ("AGC") as authority that the Department has not created any "additional cost" to political subdivisions. *Id*. at 593. The Department's first actual application of the Act to increase wage rates here raises a wholly different question than the facial challenge to the bookkeeping requirements of the Rule addressed in *AGC*. In *AGC*, the only constitutional question was whether the procedural accounting requirements of the Rule facially violated Hancock. In holding that it did not, the Court relied on the Department's representation also made here that the Rule merely clarified the "existing" statute and

classifications. *Id*. at 590, 593; (LF 86-87, UF 27-8; LF 681; Rule codifies "existing practices."). As now enforced, however, it its clear that the Department is now using the Rule to *change* the existing practice, not codify it.

The imposition of a new wage rate increases costs on political subdivisions and the trial court's rejection of the Hancock claim contradicts this Court's application of that constitutional provision in *MML* and *Brunner*. The trial court's judgment should be reversed, judgment entered for Appellants including an award of their costs and attorney's fees pursuant to Mo. Const. Art. X, §23 (A-10) as prayed for in the Petition.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEPARTMENT BECAUSE THE DEPARTMENT'S FIRST APPLICATION OF THE OCCUPATIONAL TITLE RULE TO OUTDOOR PIPE PROJECTS VIOLATES THE PREVAILING WAGE ACT IN THAT IT IMPOSES A WAGE RATE FOR SUCH WORK WITHOUT REGARD AND CONTRARY TO THE ACTUAL WAGE RATES PAID OR WORKERS USED IN THE LOCALITIES FOR THAT WORK

The Department's imposition of Pipe Fitter wages for work on Outdoor Pipe Projects also violates the Prevailing Wage Act which requires the Department to determine and apply the prevailing wage based on actual wages that *are* paid in the locality – not wages based on *contrived* interpretations that do not reflect the actual wages paid. As a direct result of the Department's actions, the wage costs on Outdoor Pipe Projects are now 42% higher for a government entity than a private utility

contracting for exactly the same work. (LF 90, UF 40; LF 684 (undisputed)) This type of disparity between wages paid on public and private projects is exactly what the Act prohibits when it requires public entities and their contractors to pay the "prevailing wage" – not the prevailing wage plus 42%!

A. The Trial Court's Judgment is premised on rejection of a legal argument not raised by appellants

The trial court first erred in articulating Appellants' legal position. Specifically, the January 15, 2003 Judgment describes Appellants' claim as "essentially" that the Department cannot impose Pipe Fitter Wages on Outdoor Pipe Projects "because that work is customarily performed in the St. Charles area by members of the Laborers' Union." (A-35, Judgment.) This is not at all what Appellants alleged. While the unrebutted evidence clearly did show that the work on Outdoor Pipe Projects was in fact performed by Laborers and not Pipe Fitters in the Subject Counties (LF 82, UF 12, 14), this was just part of the evidence establishing the critical foundation of Appellants' case: The "actual wages" paid for such work in the Subject Counties were, have always been, and still are, the Laborer wages, not Pipe Fitter wages. *See* discussion of evidence, *supra*, at pp. 29-31.

Appellants' statutory argument is that the Department is without authority under the Act to require Pipe Fitter wages, in part because "the wage that has been and is actually paid in the Subject Counties (and throughout the state) for such work is the lower General Laborer prevailing wage." (LF 96, Pls.' Mot. for Summ. J. at 20.) As such, the

trial court erroneously granted judgment by rejecting an argument never made by Appellants.

Moreover, while Appellants certainly agree that the Act may not be used to *require* certain workers to perform the work, the Department absolutely must look to the type of worker who actually performs the work in determining which work classification is most "similar." As discussed below, the fundamental requirement of the Act is to require the wage that "prevails" in the locality, and this Court has already held that such determinations simply cannot be made without looking to the actual workers used and actual wage paid for the identical work. *City of Joplin*, 329 S.W.2d at 695.

B. Imposition of Pipe Fitter Wages Violates the Statutory Mandate to "Ascertain" the Wage Actually Paid for Work of a Similar Character in the Locality.

The trial court also erred in holding that the Act gave the Department authority to impose Pipe Fitter wages based on its determination of "similar work" in disregard to the actual workers used and wages paid for that work in the localities. (A-35, Judgment.) The authority to determine "what work is similar to other work" simply does not empower the Department to impose its own view of what *should* be paid in contravention of the undisputed evidence of what actually *is* paid for such work.

The Department alleges that it has statutory authority to determine what is "similar" work, irrespective of the actual practices or wages paid in the "local marketplace" and based on its own views of what *ought* to be considered "similar." (LF 707, Dept.'s Suggestions at 17.) The legal issue before the Court on this Point II is simple: may the

Department disregard the actual worker used and actual wage paid for work in the localities and choose a different wage paid to a different worker simply because, contrary to the marketplace, the Department believes the "tools" and "skills" are theoretically more "similar" to the Pipe Fitter classification than the one actually paid and used? This Court and other Missouri courts have already decided this question against the Department.

1. The Act Requires the Department to Apply the Actual Wage Rates and Practices of the Local Marketplace in Determining Prevailing Wages.

Since 1957, the Department has been required to "determine the prevailing hourly rate of wages in each locality" that political subdivisions and their contractors must pay workers on public works projects. (A-4 – A-5, RSMo. §§ 290.250-260.1; LF 81, UF 8; LF 677 (undisputed).) "Prevailing hourly rate of wages" is defined as "the *wages paid generally, in the locality* in which the public works is being performed, to workmen engaged in work of a similar character." (A-3, RSMo. §290.210(5) (emphasis added).) The Statute expressly requires the Department to base its determinations on the "rates *that are paid* generally within the locality." (A-5 – A-6, RSMo. §§ 290.260.1-262.1 (emphasis added).) Thus, Missouri courts have consistently held that the Act requires the Department to use, if possible, the *actual* wages in the local marketplace as the basis for ascertaining the prevailing wage for any particular type of work. *See Branson R-IV*, 888 S.W.2d at 724 ("prevailing wage rate must, if possible, be based on a wage actually paid within a locality").

In *Branson R-IV,* the court explained that the Department is statutorily bound to use the "*rates that are paid* generally within the locality." *Id*. at 724 (emphasis in original). The Court concluded that, "[w]ithout question, the phrase *rates that are paid* means the rates that are "actually" paid and not some average wage rate or other derivative figure." *Id.* at 724.

In *Central Missouri Plumbing v. Plumbers Local 35,* 908 S.W.2d 366, 371 (Mo.App**.** 1995), the court again observed that the prevailing wage must be based on wages "actually paid" in the locality for the work. In *Central*, the Commission was held to have violated the Act by disregarding actual wages and attempting to establish its own amalgam of wages to determine the prevailing wage rate. *Id*. at 372. In admonishing the State, the court concluded:

> In the instant case, it is clear that the rate established by the Commission in its use of the collective bargaining agreement was not the prevailing rate since the rate was not an actual rate, but an artificial one based upon a contorted formula using figures out of the collective bargaining agreement. The use of this contrived formula was arbitrary.

Id. at 372. Here too, the "actual" wages paid for work on Outdoor Pipe Projects are undisputedly General Laborer wages. The Department has contrived a new interpretation to require wages that are *not* those actually paid, but a much higher wage of worker of a classification that undisputedly does <u>not</u> generally perform the work. Given that General Laborer wages are not the "actual" wage rate paid for work on Outdoor Pipe Projects, the Department's imposition of any other rate violates the requirements of the Act.

In one of the first cases interpreting the Act, this Court confirmed that the phrase "the prevailing rate of wages" was "synonymous with market rate." *City of Joplin.* 329 S.W.2d at 691 (quoting Justice Cardozo). The Court held that, in fact, the actual local wage practices that the Department now claims are "irrelevant" are exactly what must be looked at in determining the local prevailing wage rate. (LF 704, 707, Dept.'s Suggestions at 14, 17.) In determining what is "work of a similar character in the locality," the Court held that it must "resort to means of common knowledge and experience in this state" and that:

> [W]e cannot construe the Act to mean that the same or identical work is not to be considered in determining the wages and type of workmen to be used on such a project.

City of Joplin, 329 S.W.2d at 691, 695; *See State v. Lee Mechanical Contractors, Inc.* 938 S.W.2d 269, 272 (Mo. 1997).

The Department, however, seeks to ignore the wage and worker used for "the same or identical work," as well as the "common knowledge and experience," and artificially change the wage classification and rate to Pipe Fitter. In so doing, the Department applies the same wage paid for plumbing work within "Building construction" to outdoor work within "Heavy construction." Not only does this ignore the actual wage practices, it violates the Department's own Rule by placing purely outdoor "Heavy/Highway" work within the "Building" classification. (*See* A-14, 8 CSR 30-3.040(1) (requiring that work "shall be classified as either – (A) Building construction; or (B) Highway and heavy construction").)

Regardless of the good or ill intentions of such a change, or the logic or reasonableness of the academic theory underlying it, the Department's application of the Act is contrary to the requirement that the Department apply the wages that actually "prevail" and "are paid" in the locality. *See Branson R-IV*, 888 S.W.2d at 724; A-5 – A-6, RSMo. §§ 290.260.1-262.1. The reality is that outdoor pipe work – without distinction as to whether it is pressurized or not – is done by Laborers at Laborer wages not by Pipe Fitters nor at Pipe Fitter wages. No amount of explanation for the change can avoid the undeniable fact that this application violates the requirement to apply the actual practices of the locality based on the "common knowledge and experience," the workers used, and the wage rates that actually "are paid" in the locality.

2. The Department's Application Replaces the Actual Worker and Actual Wage Paid with an Artificial Surrogate to Determine the Wage Rate.

After forty years of historical evidence that Outdoor Pipe Projects are generally performed by Laborers at the General Laborer Wage, on what basis does the Department purport to justify a change in the classification and wage paid? According to the Department, the Pipe Fitter classification is justified because the "tools" "skills" and "techniques" used by laborers on outdoor *pressurized* pipeline work is really more like Pipe Fitter work and therefore they should be paid that wage. (*See* LF 777, Dept.'s Proposed Judgment; LF 216, Commission Order.) The Department concedes its interpretation is not based on the type of worker that has traditionally performed work or the wage classification that has generally been paid for that work. Rather, the Department relied instead on dictionary definitions and similar input that did not relate in

anyway to the actual marketplace wage practices. (*See* Facts, *supra* at p. 12-13).

Ignoring the undisputed evidence of how the marketplace has always classified Outdoor Pipe Project work, the Department fabricated a new distinction not supported by any real-world Missouri practice: that work on "pressurized" (as opposed to "non-pressurized") pipe should be classified and paid differently than the marketplace has always done so. The Department claims that pressurized pipe work involved "more skill" than non-pressurized pipe work and therefore should be paid the (higher) wage for Pipe Fitters. (LF 777, Proposed Judgment.) This type of bureaucratic "comparable worth" assessment is wholly beyond the authority of the statute which nowhere authorizes the use of similar "skills" to override the wage rates that actually "are paid" for the work.

The Department's attempt to change the market wage by resort to surrogates such as similar "tools" or "skills," is directly contrary to the Missouri Supreme Court's expression of what must be reviewed by the Department in ascertaining the prevailing wage. (LF 777, Dept.'s Proposed Judgment.) In *City of Joplin*, the Department made a virtually identical effort to unilaterally impose a higher wage rate based on its assessment of "similar skills" in disregard to the actual type of workers used and the actual wage rates paid for the "identical" work in question. This Court rejected the State's wage determination. *City of Joplin*, 329 S.W.2d at 695. In determining the appropriate wage rate for workmen installing a sewer main pipeline, this Court held that the Commission violated the Act by disregarding the evidence of the actual "wages paid and the type workmen used" and instead requiring a wage for work that it believed was "similar" based on the "same skills used." *Id*. at 694, 695. The Act did not permit the Department

to disregard the wage paid on identical work in the locality simply because it thought "similar skills" should control. *Id.*

Yet, this is exactly what the Department has done here. The Department concedes that its requirement of Pipe Fitter wages is based on its opinion that the "skills" and "tools" used on these outdoor projects are "similar" to those of Pipe Fitters in the unrelated work inside and related to Buildings. (*See, e.g.*, LF 219, May 1997 Commission Order at 5; LF 222; June 1997 Commission Order at 3.) The Department conceded it did not collect any wage data or even *consider* who traditionally performed the work and what work was actually paid in the locality. (LF 71-2, Admis. No. 8; LF 162-3, Boeckman Dep. at 75-76.) The Department also admitted that it had no evidence that workers performing any of the tasks now contained in the occupational title of Pipe Fitter on Outdoor Pipe Projects were paid at the Pipe Fitter prevailing wage, or any other wage other than the General Laborer wage. *Id.* The Department's representative, Jim Boeckman, clearly articulated that the Department wholly disregarded the "wages paid and the type of workmen used" for the same or identical work – the very information this Court held in *City of Joplin* **must** be reviewed in ascertaining the required rate:

> Q: … did the Division collect any evidence or take into consideration any facts as to what workers actually doing that work had been paid prior to the that time?
>
> A: No.

> Q: So the only consideration was that in the division's opinion, outdoor pressurized pipe work should be considered similar work to indoor pressurized pipe work and paid at pipe fitter prevailing wage, correct?
>
> A: Correct. Other than what I said earlier about we considered comments; Dictionary of Occupational Titles; CBA, collective bargaining agreements; that's correct.

Id. Indeed, the Department represented, and the trial court adopted verbatim, that "The Department *is not concerned* with who does particular work." (LF 778, Dept.'s Proposed Judgment; A-36, Judgment (emphasis added); *see also*, LF 704, Dept.'s Suggestions at 14 ("It is irrelevant to the Department whether a member of a laborers' union or a member of a pipe fitters' union does the work of installing pressurized pipe lines."); LF 93, 686; UF 55 ("undisputed" that "Department did not investigate as to which workers actually did the installation of outdoor pressurized pipe or what wage had actually been paid to such workers in any county").)

Thus, it is undisputed in the record that the Department unilaterally imposed Pipe Fitter wages without "consideration," "investigation" or even "concern" for the "wages paid and the type workmen used." This is obviously contrary to the Court's express direction in *City of Joplin*, as it sets a wage classification rate in total disregard to the actual workers used and the actual wages paid for this specific work in the localities.

While the Statute clearly allows consideration of relevant factors in determining the wage for "similar work," the Department cannot, as it has done here, disregard the clear evidence that the market rate and classification for this work is and always has been

"Laborer," not "Pipe Fitter." Here, of course, the Laborer wage has always "prevailed" as the wage rate and proper work classification for this work. The Department has clearly violated its statutory mandate in attempting to change that prevailing wage, rather than merely "ascertaining" it as required by the statute. (A-5 – A-6, RSMo. §290.260.1-262.1.)

3. The Department's Rule Cannot Alter the Statutory Duty to Determine and Apply the Wages Actually Paid in the Locality.

As the state agency charged with administration and enforcement of the Prevailing Wage Act, the Department is empowered to "establish rules and regulations for the purpose of carrying out the provisions of [the Act]." (A-4, RSMo. §290.240.2.) The Act does not, however, give the Department the power to independently set or change prevailing wage rates or to establish classifications of wages contrary to existing local practices, a fact which the Department concedes. (LF 81, 86-87, UF 8, 27, 28; LF 677, 681 (undisputed).) Yet, it is undeniable that the Department's action has imposed a wage rate which clearly *changed* the wage that otherwise "prevails" in the locality.

The Department claims it can impose Pipe Fitter wages on Outdoor Pipe Projects because it enacted a Rule (A-22, 8 CSR 30-3.060(T)) placing all "pressurized" pipeline work in the same "occupational title" as indoor plumbing work. (A-22). In so doing, the Department forced outdoor "Heavy Laborer" work into Pipe Fitter "Building" work in disregard to its prior Wage Order language and it own Rule requiring that all work must be designated as "either" "Building" or "Highway/Heavy " outdoor work. (A-14, 8 CSR 30-3.040(1).) Whether this substantially increases the required rate from the wage actually previously and still paid in the marketplace is simply of no "concern" to the

Department. Rather, the Department rests its position entirely on its claimed authority to determine what it thinks is "similar work" – authority even it concedes it did not have when judgment was rendered against it in *Essex I* and *II.* (LF 92-93, UF 50-54; LF 685-86 (undisputed).) This view clearly turns the statute on its head, as it would allow the Department to reject the wage rates paid for *identical* or similar outdoor work, so that it can impose a higher rate paid on unrelated indoor "Building" work simply because it believes the work is more "similar" – based on the "tools" used or academic "definitions" – than the classification and wage rate actually used in the marketplace for the last forty years! In other words, the Department claims the right to reject the wage classification that the marketplace has said is "similar" and impose its own that is contrary to the actual wage practices.

For example, if an Electrician installs electrical conduit pipe, he or she could be required to be paid Laborer or Pipe Fitter wages for that work because it uses "similar skills" and "tools" as the similar pipe installed by Laborers outdoors or Plumbers indoor. Yet, this would be despite the fact that the Electrician had always been paid the Electrician wage rate because Electricians generally did the work. The Department clearly erred in disregarding the evidence of which workers customarily do the work and what wage rate is paid.

a. The Rule must be applied only to codify "Existing" Practices.

This case is not a challenge to the adoption of the Rule itself or the Department's authority to establish internal procedures. Indeed, because the Department has represented that the Rule imposes only procedural, not substantive, changes, facial

attacks without a specific unlawful application have been understandably rejected. (*See, e.g., AGC*, 898 S.W.2d at 590-91; (LF 396-97, Baker Dep. at 36-37(occupational titles were "just a procedural change").)

Rather, it is the Department's first actual and threatened application and interpretation of the Rule to Outdoor Pipe Projects that is at issue and which conflicts with the plain language of the Act and the Department's prior representations about its purpose. As explained by the court in *AGC* in 1995:

> [The Occupational Title Rule] does not relieve the Department of its continuing statutory obligation under § 290.260.1 to determine the prevailing wage for each locality. Nor does it change the manner in which the Department determines those wage rates.

AGC, 898 S.W.2d at 594. Rather, the Rule does nothing more than "formally define the occupational titles which have been used since 1957." *Id*. at 590. The Department still admits that the Rule was designed only to "clarify and codify *existing* practices." (LF 86-87, UF 27-8; LF 681 (undisputed).) Contrary to these prior representations, however, the Department is now clearly attempting to enforce and interpret the Rule in such a way as to ***change*** rather than ***codify*** the wage rates and local practices existing since 1957.

With respect to Outdoor Pipe Projects, what was the "existing" custom and practice supposedly codified by the Rule? The Department defined it very clearly in the Project Specific Wage Orders and Annual Wage Orders it distributed over the years. The documents required "General Laborer" wages to be paid for "*all work* in connection with sewer, water, gas, gasoline, oil, drainage pipe, conduit pipe, tile and duct lines and all

other pipe lines" (A-49 & A-51, 1994-95 Annual Wage Orders, LF 316-17, 1991 Project-Specific Prevailing Wage Determination.)

Yet, the Department *now* claims that "*all* work" really meant only "*some* work" and "*all* other pipe lines" really meant only "*non-pressured* pipe lines," including types that do not even exist. (*See* LF 685 at ¶ 48; LF 687-88 at ¶ 3.) The Department's position is patently disingenuous. Even the Department's own Supervisor testified that "someone doing the work of outdoor pressurized pipe installation would understand" that the Department's prior definition of "General Laborer" work would "include pressured pipe." (LF 182, Amos depo. at 89.) It cannot now claim the language never meant what it clearly stated.

b. The *Essex* decisions held the Department was without *Statutory* authority to impose Pipe Fitter wages.

There is, of course, no genuine dispute that the Department's current position does not reflect "existing practices," as the existing custom was already judicially determined in a judgment against the Department. *Essex II*, 815 S.W.2d at 138 ("laborers in Jefferson County working on public works projects customarily installed ductile iron pipe"). The Department admits that the existing local practice — Laborers performing the work and paid General Laborer wages — did not change. (LF 89, UF 35; LF 682 (admitted).) What changed is the Department's assessment of its ***own statutory authority*** under the Prevailing Wage Act, which it believes was enhanced after *Essex I* and *II* by its adoption of the Rule.

The *Essex* cases arose from a 1985-86 public works sewer project in Jefferson County involving the outdoor installation of pressurized iron pipe. *See Essex Contracting, Inc. v. City of DeSoto*, 775 S.W.2d 208, 211 (Mo.App. 1989) ("*Essex I*"). The contractor, as was the custom, paid its workers the prevailing wage for laborers. *Id.* at 211. The Pipe Fitter's Union complained, and the Department withheld $34,683 from the contractor, requiring Pipe Fitter wages to be paid. *Id.* at 212. The contractor, as here, challenged the Department and the trial court found no Prevailing Wage violation for paying Laborer wages. *Id*. at 212.

On appeal, the Court of Appeals questioned the Department's attempt to unilaterally assert that the work was properly within the Pipe Fitter craft. Describing the Department's claim as "suspect," the court held that the:

> Department of Labor and the DNR are not empowered, under the guise of enforcing the provisions of the contract relating to prevailing wage laws, to unilaterally consider and resolve what is, in fact, a union jurisdictional dispute.

Id. at 214 (*Essex I*). The Court of Appeals therefore remanded solely for a determination whether the "custom and practice" in Jefferson County dictated that Laborers or Pipe Fitters customarily did the pressurized pipe installation work at issue. *Id.* at 215. As the court explained, "[i]f laborers were, as alleged in the petition, the proper workmen to install pressurized pipe then Essex did not violate the provisions of the contract requiring payment of prevailing wages." *Id*. at 215.

The subsequent trial on that issue established that "laborers in Jefferson County working on public works projects customarily installed ductile iron pipe." *Essex II*, 815 S.W.2d at 138. Accordingly, the Department was held to have unlawfully required Pipe Fitter wages. *Id*. In an argument notably foreshadowing its position in this case, the Department appealed again arguing that limiting the evidentiary inquiry to which workers customarily worked on ductile iron pipe projects was incorrect because ***the Department*** had "the ***sole authority to determine and classify the work***." *Id*. at 138 (emphasis added.) The Court rejected this argument, reminding the Department that "[n]owhere in the statute is authority vested in [the Department] to determine which type of workman will be required to perform a particular task on a public works project." *Id*. at 139. The Court therefore affirmed that the Prevailing Wage Act was satisfied by payment of Laborers' wages, not Pipe Fitter wages, for workers installing pressurized ductile iron pipe because "laborers in Jefferson County working on public works projects customarily installed ductile iron pipe." *Id*. at 138.

In so doing, *Essex II* affirmed a judgment against the Department on exactly the same issue as presented today — namely, whether the Department has the statutory authority to require Pipe Fitter rather than Laborer wages to be paid on an outdoor pressurized pipe project when Laborers customarily performed this work (at Laborer wages). The Department does not claim that the statute has changed, but now says only that its Rule provides it the authority denied it in *Essex*. (LF 93, UF 53-54; LF 685-86 (undisputed).)

The court's ruling against the Department in *Essex II* was the motivation cited by the Department for promulgating the Rule. In her deposition and in public materials published by the Department, Director Colleen Baker explained,

> The Rule was developed to overcome the problem identified by the court in *Essex Contracting, Inc. v. City of DeSoto*, 815 S.W.2d 135, 139 (Mo.App. 1991) . . . that the Department of Labor ***did not have authority*** to determine which type of workmen are required to perform a particular task on a public works project.

(LF 120, Baker depo. at 126, 132-33; LF 132, Ex. 6 to Baker depo (emphasis added); LF 92, UF 50; LF 685 (undisputed).) Now, according to the Department, it can require Pipe Fitter wages for work on Outdoor Pipe Projects because the Rule by itself — gives the Department the very "statutory" authority the *Essex II* court said it lacked. *Essex II*, 815 S.W.2d at 139. (LF 93, UF 54; LF 686 (undisputed).) As explained by the Department's Assistant Director, Jim Boeckman, in his deposition:

> Q: So the fact that, at least in Jefferson County up to 1991, workers doing the installation of ductile iron pressurized pipe on an outdoor pipe project had been paid the Laborers' wage, that fact does not change the Division's position that it should be paid at the Pipe Fitter wage, is that correct?
>
> A: Yes.
>
> * * * *

Q: Did the Division have the authority to require contractors doing outdoor pressurized pipe projects to pay those workers at the prevailing wage of Pipe Fitter prior to the Occupational Title Rule?

A: That was our position, **but from an enforcement standpoint based on *Essex*, no.**

Q: But now the Division has that authority?

A: Based on the rule that defines — well, work descriptions, yes.

(LF 157, 171, Boeckman depo. at 50, 101.)

Thus, the Department now relies on its Rule to impose the same Pipe Fitter wage that the *Essex* courts prohibited because the work was actually "customarily" performed by Laborers. The *Essex II* court, however, did not base its decision on the lack of ***rulemaking*** authority; it stated that the Department had no ***statutory*** authority to interject its opinion in what it called a union "jurisdictional dispute." *Essex II*, 815 S.W.2d at 139.

4. The Department has a record of disregarding its limited authority

The Department has a long history of recidivism when it comes to attempting to expand or enforce the Prevailing Wage Law in violation of the statute. The holdings of Missouri courts deprive the Department of any credibility in its absurd interpretations of its Rule and the Statute. The Department has been consistently admonished by the courts

for exceeding its authority. *See Essex II*, 815 S.W.2d at 138 (rejecting the Department's enforcement of Prevailing Wage Law as without "authority" in the "statute"); *State Dep't of Labor and Indus. Relations, Div. of Labor Standards v. Board of Pub. Util. of Springfield*, 910 S.W.2d 737 (Mo.App. 1995) (granting summary judgment against Department); *Hershaw v. Fender-Mason Elec. Co.*, 664 S.W.2d 628, 629 (Mo.App. 1984) (holding Department's Prevailing Wage Rule in conflict with Act); *Central Missouri Plumbing Co.*, 908 S.W.2d at 372 (finding Commission's prevailing wage rate arbitrary because the rate was not an actual wage rate that workers received in the locality); *Bruemmer v. Missouri Dep't of Labor Relations*, 997 S.W.2d 112, 118-19 (Mo.App. 1999) (ordering modification of prevailing wage rate in accordance with the proper definition); *City of Joplin v. Industrial Comm'n of Missouri*, 329 S.W.2d 687, 695 (Mo. banc 1959) (upholding trial court's determination that the Department's classification and wage rates for sewer construction were improper because "the Commission failed to give due consideration to the statutory requirement that rates as are paid generally within the locality should also be considered"); *Woodman Eng'g Co. v. Butler*, 442 S.W.2d 83, 86 (Mo.App. 1969) (setting aside Department's wage rate for Pipe Fitters for failure to make proper investigations and failure "to determine what wages were paid by other contractors in the locality at the time"). A definitive statement from this Court rejecting the current effort by the Department is therefore appropriate.

5. The Department's cited precedent is not on point

The Department dismissed or ignored the rulings in *Joplin*, *Branson*, *Central*, and *Essex I and II* and relied instead on two cases upholding the Department's authority to enact or decline to enact procedural rules. Each of the cases cited by the Department and relied on by the trial court involve a facial challenge to the procedural Rule itself without application to the facts. *See, e.g., AGC*, 898 S.W.2d 587 (Rule); *Heavy Constructors Ass'n v. Division of Labor Standards*, 993 S.W.2d 569 (Mo.App. 1999) (amendment to the Rule). Under the deferential standard of review applicable to such cases, the courts agreed that it was not facially unreasonable for the Department to assign tasks to certain occupational titles. These cases did not address any application of the Rules to enforce a higher wage rate than that which actually prevailed in the locality. The only courts to have ever ruled on the unlawful attempts by the Department to require Pipe Fitter wages where the actual "prevailing" wage was that of Laborer, were *Essex I* and *II.* Indeed, no Missouri court has ever enforced any wage rate other than the Laborer wage rate on outdoor Pipe Projects. (LF 84, UF 19; LF 681 (undisputed).)

In upholding the initial adoption of the Rule, the *AGC* court made clear that the Rule's occupational title definitions are only "indirectly connected" to the actual wage rate that could be *required* for any given work. *AGC*, 898 S.W.2d at 594. The court explained that while interested parties may request changes to the various definitions:

> [W]hether or not a definition [of an Occupational Title] is eventually modified, the [Department] still has the ultimate responsibility to determine

> the prevailing wage rate by compiling the hours worked and wages paid for the ***items within the definition***.

Id. at 594 (emphasis added). Thus, as *AGC* recognized, irrespective of the definitions used, the Department is still obligated to ensure that the "prevailing wage" is based on the actual wages paid for that specific "item" of work in the locality. While the Department has strangely chosen to include installation of outdoor distribution lines as an ***item*** under the Occupational Title of Pipe Fitter (A-22, 8 CSR 30-3.060(T)(4)), the Department cannot require Pipe Fitter wages to be paid for that work when the wages ***actually paid for the work in the locality*** are at the lower General Laborer rate. In other words, the definitions are for record keeping purposes, but whether accurate or not, they may not be used to change the substantive wage rates from those that "prevail" for that work.

These Rule challenge cases therefore do not provide the Department any defense to the undisputed evidence that it has applied the Rule to clearly *change* not reflect the actual wage rates paid for the same items of work in the Subject Counties.

6. Conclusion

There is ample and overwhelming evidence that the wage rate and worker classification actually used for outdoor pressurized pipe work in the Subject Counties is that of General Laborers. Instead of using this classification and rates, however, the Department insists on Pipe Fitter wages based on its use of extraneous information unrelated to the marketplace. As a result, Outdoor Pipe Projects now are paid under two schemes: (1) significantly higher Pipe Fitter wages are mandated by the Department on taxpayer-funded public projects, while (2) the rest of the marketplace continues the forty

year practice of paying lower Laborer wages on non-public projects. This result is clearly hostile to the intent and purpose of the Prevailing Wage Act. The Department cannot impose a wage rate that the *Essex* Courts held it lacked *statutory* authority to impose – *i.e.,* to "unilaterally consider and resolve what is, in fact, a union jurisdictional dispute." Nor can it accomplish the result by unlawfully disregarding the "wages paid and type of workmen used" as it similarly tried in *City of Joplin*.

In short, the Department has once again unlawfully attempted to enforce the Prevailing Wage Law in violation of the statute, and summary judgment should be granted against the Department and in favor of Appellants.

III. THE TRIAL COURT ERRED IN UPHOLDING THE DEPARTMENT'S INTERPRETATION OF THE OCCUPATIONAL TITLE OF "GENERAL LABORER" AS APPLYING ONLY TO PIPELINES THAT ARE NOT "PRESSURED" WHEN IN OPERATION IN THAT IT RENDERS 8 CSR 30-3.060(K)(2)(A) VOID AS APPLIED BECAUSE THAT INTERPRETATION MAKES KEY PORTIONS OF THE LANGUAGE MEANINGLESS.

The trial court's approval of the Department's application of the Occupational Title Rule cannot stand because it requires an absurd construction of the Rule's express language and because it renders a key segment of the Rule meaningless. "A cardinal rule of both statutory construction and administrative rule interpretation is that every word, clause, sentence, and section thereof should be harmonized and given meaning unless it conflicts with ascertained legislative intent." *Natural Res., Inc. v. Missouri Highway &*

Transp. Comm'n, 107 S.W.3d 451, 457, n.9 (Mo.App. 2003) (citing *Cub Cadet Corp. v. Mopec, Inc.*, 78 S.W.3d 205, 214-15 (Mo.App. 2002)). *See also, Hyde Park Housing P'ship v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993) ("It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect"). In *Hyde Park*, this Court invalidated the Director of Revenue's interpretation of a statute because the interpretation required a key descriptive phrase to be read out of the statute, rendering it "idle verbiage." *Hyde Park*, 850 S.W.2d at 85.

Based on the facts, there is no dispute that in changing the definition of General Laborer, the Department for the first time made a distinction between "pressurized" and "non-pressurized" pipe on Outdoor Pipe Projects. (LF 87, UF 30; LF 681 (undisputed).) The Occupational Title Rule now limits General Laborer work to "work in connection with non-pressurized pipe lines, such as non-pressurized sewer, water, gas, gasoline, oil . . . and all other non-pressurized pipe lines." (A-19, 8 CSR 30-3.060(K)(2)(A).) The Department strains to interpret this language to mean that General Laborer wages only apply if the work relates to gas, gasoline, oil and other pipelines that will not be pressurized when in use. (LF 91, UF 46; LF 685 (undisputed).)

The Department's interpretation and application of this language is absurd because, as the Department readily admits, there is no such thing as a public works project involving gas, gasoline or oil pipelines that will not be pressurized when in use. (LF 92, UF 47; LF 685 (undisputed).) By their very nature all such pipelines must be under pressure to be operational. (*Id.)* Thus, as currently applied and interpreted by the Department, the description of General Laborer tasks related to Outdoor Pipe Projects is completely meaningless – not ambiguous – because it refers to non-existent work. (LF 92, UF 47, 48; LF 685 (undisputed).)

The trial court found the Rule unambiguously allowed Laborer wages only on pipes not intended to be under pressure.[5] (A-39, Judgment.) Yet, even the Department suggested its own Rule was "not a model of clarity." (LF 687 at¶ 3.) Rather than accept the interpretation that would give meaning to the words actually used by the Department, the trial court instead went out of its way to offer an explanation for the Department's interpretation—incompetence! The trial court simply reasoned that the Department's interpretation of the Rule was not vague or confusing if one accepts that the Department merely failed "to consider at the time they drafted the regulation whether or not there are nonpressurized gas, gasoline, and oil piping systems …." (A-39, Judgment.) In other words, it wasn't ambiguous, it was just *wrong*. This reasoning is contrary to basic legal

[5] Although the trial court rejected Appellants' claim that the Rule is ambiguous, this again is not really what Appellants alleged. Appellants argue that the Department's *interpretation* of the Rule is absurd and unreasonable based on the language used.

tenets of statutory construction.

There is only one interpretation of this language that gives every word meaning and that, while still not a reflection of existing wages and practices, stays much closer to that statutory mandate. If the word "non-pressurized" as used in the Occupational Title of General Laborer means a pipe line that is "non-pressurized" at the time of the work, then it would have clear meaning because, unlike the Department's interpretation (LF 70, Admis. Nos. 3-5), this would describe work that actually exists. This interpretation gives meaning to all of the words in the Rule as required. *Natural Res., Inc.*, 107 S.W.3d at 457, n.9; *Hyde Park*, 850 S.W.2d at 84. Moreover, work on Outdoor Pipe Projects — "all work" of which was previously defined by the Department as "General Laborer" Work in its Wage Orders (LF 83, UF 16; LF 680 (admitted)) —involves the installation of pipe that is not pressurized at the time of the work. (LF 101, Cannon Aff. at 3; LF 106, Karsten Aff. at 3.) This interpretation, therefore, is the only interpretation that does not require the Court to excise terms that would otherwise have no meaning.

The trial court, however, rejected this interpretation, and instead adopted the Department's interpretation that makes the relevant language meaningless. (A-38 – A-39, Judgment.) As discussed in Points Relied On I and II, the Department's application of the Rule violates the Hancock Amendment and exceeds its statutory authority, but such application must also be invalidated because it requires an unsupportable construction of the Rule's own language. This Court should not likewise give effect to the Department's

interpretation because to do so requires the Court to render this key language "idle verbiage" and read it right out of the Rule. *Hyde Park*, 850 S.W.2d at 85.

CONCLUSION

WHEREFORE, for the reasons stated above, Appellants request that this Court reverse the trial court's grant of summary judgment and enter judgment in favor of Appellants, and remand to the trial court for award of Appellants' attorneys' fees and costs pursuant to Art. X §23, and such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 84.06(c) AND (g)

I, Daniel G. Vogel, hereby depose and state as follows:

1. I am an attorney for Appellants Purler-Cannon-Schulte, Inc. and Karsten Equipment Co.

2. I certify that the foregoing Brief of Appellants Purler-Cannon-Schulte, Inc. and Karsten Equipment Co. contains 17,449 words and 1,517 lines (including footnotes) and thereby complies with the word and line limitations contained in Missouri Rule of Civil Procedure 84.06(b.)

3. In preparing this Certificate, I relied upon the word count function of the Microsoft Word 2002 word processing software.

4. I further certify that the accompanying 3½" disk containing a copy of the foregoing Brief of Appellants has been scanned for viruses and is virus-free.

_____

Paul V. Rost, Mo. Bar No. 39958

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via first class United States mail on this 6th day of August, 2003, to:

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